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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sun State Towers LLC,
10 Plaintiff,
11 v.
12 County of Coconino,
13 Defendant.
14

No. CV-17-08075-PCT-GMS

ORDER

15 Pending before the Court is Defendant's Motion to Dismiss Count II from
16 Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1). (Doc. 14.) The Court denies
17 the motion.¹

18 **BACKGROUND**

19 Sun State Towers, LLC ("Sun State") seeks to construct a personal wireless
20 service tower in Coconino County (the "County") for lease to Verizon Wireless
21 ("Verizon").² (Doc. 1 at 2.) Sun State leased a site to construct the tower and entered an
22 agreement by which Verizon would install its equipment on it. (*Id.*) Sun State's
23 application for a conditional permit to build the tower was approved by the Coconino
24 County Planning and Zoning Commission (the "Commission") on November 30, 2016.

25 ¹ The Defendant has requested oral argument. That request is denied as the parties have
26 adequately discussed the law and evidence, and oral argument will not aid the Court's
27 decision. *See Lake at Las Vegas Inv'rs Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d
724, 729 (9th Cir. 1991).

28 ² The Court takes as true the allegations in Plaintiff's Complaint at this stage of the
litigation. *See Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1991).

1 (Doc. 1 at 3.) However, it was later denied upon an appeal from the Navajo Tribal Utility
2 Authority (“NTUA”). (*Id.*) The NTUA argued that a tower on tribal land is already
3 available for collocation. (*Id.*) The Commission’s written denial of Sun State’s
4 application stated that collocation is preferable to constructing a new tower, and that the
5 proposed tower would obstruct the view of the San Francisco Peaks. (Doc. 1 at 4.)

6 Sun State filed this Telecommunications Act (“TCA”) Complaint against the
7 County. (Doc. 1.) It contains two separate claims, the first of which is not at issue.
8 (Doc. 1 at 4–6.) The County, however, asserts that Sun State does not have standing to
9 bring Count Two, in which Sun State argues that the County’s denial of its tower permit
10 prohibits the provision of personal wireless services in violation of the TCA. (Doc. 14 at
11 3.) According to the County, Sun State lacks standing to bring such a claim because Sun
12 State does not actually provide wireless services, but only leases towers to wireless
13 service providers. (*Id.*) The County asserts that the TCA affords a legally protected
14 interest only to wireless service providers and not to others. (Doc. 14 at 6–8.) Thus it
15 argues that this Court lacks subject matter jurisdiction pursuant to Federal Rule of Civil
16 Procedure 12(b)(1) because Sun State has not suffered “an invasion of a legally protected
17 interest” under the effective prohibition subdivision of the TCA and therefore lacks the
18 “injury in fact” element of Article III standing. (*Id.*)

19 DISCUSSION

20 I. Legal Standard

21 Federal courts are confined to adjudicating actual “cases” and “controversies.”
22 U.S. Const. art. III. As a necessary element of this requirement, litigants are required to
23 demonstrate Article III standing for each claim they assert. *Friends of the Earth, Inc. v.*
24 *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Valley Forge Christian*
25 *Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982);
26 *Nw. Requirements Utils. v. F.E.R.C.*, 798 F.3d 796, 807 (9th Cir. 2015). In order to meet
27 the “irreducible constitutional minimum of standing,” a plaintiff must satisfy three
28 elements:

1 First, the plaintiff must have suffered an injury in fact—an
2 invasion of a legally protected interest which is (a) concrete
3 and particularized, and (b) actual or imminent, not conjectural
4 or hypothetical. Second, there must be a causal connection
5 between the injury and the conduct complained of—the injury
6 has to be fairly traceable to the challenged action of the
7 defendant, and not the result of the independent action of
8 some third party not before the court. Third, it must be likely,
9 as opposed to merely speculative, that the injury will be
10 redressed by a favorable decision.

11 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks
12 omitted).

13 In addition to establishing constitutional standing, a plaintiff must demonstrate
14 standing to sue under the statute in question. *Lexmark Int’l, Inc. v. Static Control*
15 *Components, Inc.*, 134 S. Ct. 1377, 1387 (2014); *see also Table Bluff Reservation (Wiyot*
16 *Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 886 (9th Cir. 2001) (internal citation omitted)
17 (noting courts need not address statutory standing if a plaintiff does not establish
18 constitutional standing). A plaintiff has statutory standing if its interests are of the type
19 protected by the statute. *See Nw. Requirements Utils.*, 798 F.3d at 807–08 (“[T]he
20 plaintiff is not the subject of the contested regulatory action . . . if the plaintiff’s interests
21 are so marginally related to or inconsistent with the purposes implicit in the statute that it
22 cannot reasonably be assumed that Congress intended to permit the suit.” (quotation
23 marks and internal citation omitted)).

24 The court must accept all material allegations in the complaint as true and construe
25 the complaint in favor of the complaining party. *Tyler v. Cuomo*, 236 F.3d 1124, 1131
26 (9th Cir. 2000) (internal citation omitted). The party seeking to establish subject matter
27 jurisdiction has the burden of establishing Article III standing to sue. *San Diego Cty.*
28 *Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996) (internal citation
omitted). The court may allow or require the plaintiff to supply amendments or affidavits
to support the plaintiff’s factual allegations of Article III standing. *Maya v. Centex*
Corp., 658 F.3d 1060, 1067 (9th Cir. 2011) (internal citations omitted).

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1 **II. Analysis**

2 Plaintiff satisfies both the statutory and constitutional requirements for bringing a
3 claim under Count Two. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2
4 (1998) (contrasting statutory standing inquiry with Article III standing inquiry, which
5 “has nothing to do with the text of the statute relied upon”); *Smith v. Arthur Andersen*
6 *LLP*, 421 F.3d 989, 1006 (9th Cir. 2005) (“[T]he question of whether a plaintiff has
7 standing to bring suit, and thus whether the court has jurisdiction to hear the controversy,
8 is separate from the question of whether a plaintiff has a cause of action.”).

9 **A. Sun State has statutory standing to bring an effective prohibition**
10 **claim under the TCA.**

11 The plain language of the TCA indicates that Sun State has a cause of action under
12 the effective prohibition provision. *See Lexmark Int'l*, 134 S. Ct. at 1387 (using
13 traditional tools of statutory interpretation to determine whether a legislatively conferred
14 cause of action encompassed a plaintiff’s claim); *see also Carson Harbor Vill., Ltd. v.*
15 *Unocal Corp.*, 270 F.3d 863, 878 (9th Cir. 2001) (quoting *Caminetti v. United States*, 242
16 U.S. 470, 485 (1917)) (“It is elementary that the meaning of a statute must, in the first
17 instance, be sought in the language in which the act is framed, and if that is plain, . . . the
18 sole function of the courts is to enforce it according to its terms.”); *see also Logan v. U.S.*
19 *Bank Nat’l Ass’n.*, 722 F.3d 1163, 1170 (9th Cir. 2013) (“[W]ith any case involving
20 congressional intent, we presume that Congress expressed its intent through the statutory
21 language it chose . . . and then look to legislative history only if the language is
22 unclear . . .”).

23 Section 332 of the TCA explicitly provides a broad right of action to “*any person*
24 *adversely affected by any final action or failure to act by a state or local government*”
25 that restricts wireless services.

26 Any person adversely affected by any final action or failure to
27 act by a State or local government or any instrumentality
28 thereof that is inconsistent with this subparagraph may, within
30 days after such action or failure to act, commence an
action in any court of competent jurisdiction.

1 47 U.S.C. § 332(c)(7)(B)(v). Nothing in that language implies that only consumers of
2 personal wireless services—as opposed to those who engage in its provision—have a
3 right to sue under the statute. Nor does the statute distinguish between the providers of
4 wireless services and the providers of infrastructure on which the wireless service
5 providers may rely in providing such services. The statutory reach, thus, in no way is
6 limited to prevent a claim by Sun State.

7 Other courts have adopted a similarly broad interpretation of statutory standing
8 under the TCA. *See Liberty Towers, LLC v. Zoning Hearing Bd. of Tp. Lower Makefield,*
9 *Bucks Cty., Pa.*, 748 F. Supp. 2d 437, 442 (E.D. Pa. 2010) (collecting cases). This
10 interpretation is further supported by the legislative history of the TCA. The TCA
11 amended the Communications Act of 1934 to include Section 332 in an effort to limit
12 impediments to the “placement” and “construction” of “personal wireless service
13 facilities” and more rapidly increase the availability of wireless services. *See City of*
14 *Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) (citing 110 Stat. 56; 110
15 Stat. 151). The interests of those, such as Sun State, who seek to construct and lease a
16 personal wireless service facility to wireless service providers thus are among the
17 intended beneficiaries of the TCA.

18 **B. Sun State has pled factual allegations sufficient to establish Article III**
19 **“injury in fact.”**

20 Sun State has asserted factual allegations sufficient to establish that it will suffer
21 actual and concrete economic injuries by the Commission’s denial of the permit. *See*
22 *Clinton v. City of New York*, 524 U.S. 417, 418 (1998) (noting a “sufficient likelihood of
23 economic injury” establishes injury in fact for Article III standing); *see also Cent. Ariz.*
24 *Water Conservation Dist. v. U.S. E.P.A.*, 990 F.2d 1531, 1538 (9th Cir. 1993) (noting a
25 plaintiff need not demonstrate the exact extent of an economic injury to allege standing,
26 but only that some amount of harm will arise). Economic injuries arising from a
27 plaintiff’s inability to obtain the benefits of an established agreement are sufficient to
28 confer injury in fact. *See Wiyot Tribe*, 256 F.3d at 883 (holding plaintiff did not
demonstrate injury in fact when it alleged no facts showing that absent the defendant’s

1 conduct it would have been able to obtain the benefits of the agreement at issue).
2 Economic injuries arising from limitations on plaintiff’s access to its professional target
3 market also establish injury in fact. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th
4 Cir. 2012) (holding plaintiff demonstrated “injury in fact” when its only options were to
5 either “heed the regulatory prohibition, thereby incurring a direct economic injury
6 through the constriction of its market, or to disobey the regulatory command and suffer
7 legal sanction.”).

8 Unlike in *Wiyot Tribe*, where the plaintiffs were unable to identify how they would
9 be harmed by the defendant’s actions, Sun State has already executed an agreement to
10 lease the subject site for the sole purpose of constructing the wireless tower and will be
11 forced to bear the cost of the lease until it expires. (Doc. 15 at 13–18.) In addition, Sun
12 State alleges that the Commission’s denial of its application prevents it from receiving
13 the benefits of the letter of intent from Verizon, which states that Verizon will lease and
14 install their wireless equipment on Sun State’s site upon approval of pertinent permits.
15 (Doc. 15 at 20.) Further, Sun State maintains that the Commission’s denial of its permit
16 wholly prevents Sun State from serving the local target market. *See Kaahumanu*, 682
17 F.3d at 798 (finding Article III standing when new regulations constricted vendors’
18 ability to serve target markets). Sun State alleges that it, along with Verizon, inspected
19 other sites, including potential collocation at the NTUA, but determined that the property
20 Sun State leased is the only one that would sufficiently address Verizon’s wireless
21 coverage gap in a reasonable timeframe on commercially feasible terms. (Doc. 1 at 3, 5.)
22 Thus, if the County does not reconsider Sun State’s permit application to build a wireless
23 tower on the property, Sun State maintains it will be completely foreclosed from leasing a
24 wireless tower to Verizon and obtaining the accompanying financial benefits. (*Id.*)

25 CONCLUSION

26 Based on the foregoing, the Court finds that Sun State has pled sufficient factual
27 allegations to support Article III injury in fact, and that its interests are substantially
28 related to and consistent with the plain language and legislative history of Section 332 to

1 confer statutory standing.

2 **IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss, (Doc. 14),
3 is **DENIED**.

4 Dated this 13th day of July, 2017.

5 
6 Honorable G. Murray Snow
7 United States District Judge

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